IN THE

Supreme Court of the United States

OCTOBER TERM 1976

No. 75-1753

SANTA FE INDUSTRIES, INC., SANTA FE NATURAL RESOURCES, INC. and KIRBY LUMBER CORPORATION,

Petitioners,

against

S. WILLIAM GREEN, ET AL.,

Respondents.

REPLY BRIEF ON BEHALF OF PETITIONERS

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Faced with a record showing full disclosure, and a complete absence of deception, plaintiffs have carefully avoided dealing with the specific language of the statute involved in this action, which expressly refers to "manipulative or deceptive" devices. Instead, they have collected broad definitions of "fraud" from a variety of other sources, and then sought to read these definitions back into Section 10(b) of the Securities Exchange Act of 1934. Despite the rhetorical claims of "fraud," there is no element of manipulation or deception in the present action. That being true, the amended complaint fails to state a claim under Section 10(b) and Rule 10b-5.

1. Plaintiffs argue (Resp. Br. p. 11, *et seq.*)* that the second subsection of Rule 10b-5 covers the entire field of misrepresentation and non-disclosure, and that therefore the other subsections must apply to situations where deception is altogether absent. This argument, however, does not survive a fair reading of the Rule. Subdivision (b) of Rule 10b-5 applies, by its terms, only to untrue statements of fact, and to the omission of facts which are "necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." Thus, subdivision (b) covers only affirmative misrepresentations and half-truths. Deception, however, also consists of the complete suppression of facts, where there is a duty to speak; these situations of complete concealment and non-disclosure are covered by the first and third subsections (as is market manipulation). As was pointed out by the court in *Connelly* v. *Balkwill*, 174 F.Supp. 49, 59 (N.D. Ohio 1959), *aff'd on the opinion below*, 279 F.2d 685 (6th Cir. 1960):

> "Section (b) [of Rule 10b-5] requires that when a person speaks he must speak the whole truth. But that section does not in terms require a person to speak at all except when necessary to dispel the misleading implications of an antecedent partial disclosure. Section (a) of the rule forbids any scheme or artifice to defraud. Section (c) prohibits any act, practice or course of business which operates or would operate as a fraud or deceit. It is undoubtedly true, therefore, that when read as a whole, Rule X 10b-5 imposes the duty to speak and to make a full disclosure of material facts in those circumstances where silence would constitute fraud."

* Citation to "(Resp. Br. p.)" are to respondents' brief in this Court.

See, also, List v. *Fashion Park, Inc.*, 340 F 2d 457, 462 (2d Cir. 1965), *cert. denied*, 382 U.S. 811; *Joseph* v. *Farnsworth Radio & Television Corp.*, 99 F.Supp. 701, 706 (S.D.N.Y. 1951), *aff'd per curiam*, 198 F.2d 883 (2d Cir. 1952); *Trussell* v. *United Underwriters, Ltd.*, 228 F.Supp. 757, 762 (D. Colo. 1964).

This distinction is illustrated by *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, incorrectly cited by plaintiffs (Resp. Br. p. 16) as suggesting that the first and third subsections do not require deception. Immediately following the language quoted by plaintiffs, the Court in *Affiliated Ute* went on to state (406 U.S. at page 153):

> "These defendants' activities, outlined above, disclose, within the very language of one or the other of those subparagraphs, a 'course of business' [subsection (c)] or a 'device, scheme, or artifice' [subsection (a)] that operated as a fraud upon the Indian sellers. *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, *supra*. This is so because the defendants devised a plan and induced the mixed-blood holders of UDC stock to dispose of their shares *without disclosing to them material facts* that reasonably could have been expected to influence their decisions to sell." [Emphasis supplied]

Thus there is no foundation for plaintiffs' effort to extend the Rule beyond the terms of the statute. The scope of the Rule is not, and obviously cannot be, any broader than the manipulation and deception proscribed by the statute.

2. Plaintiffs make a similar argument (Resp. Br. p. 10) as to the three subdivisions of Section 17(a) of the 1933 Act, arguing that Subsection (2) covers all misrepresentations or omissions, and that therefore Subsections (1) and (3) must be intended to cover "frauds or deceptions that might not come under the category of misrepresentations or omissions." From this plaintiffs go on to argue that

their reading of Rule 10b-5 is supported by the "language and purpose" of Section 17(a).

Apart from the curious effort to interpret a rule under one statute by reference to a different statute,* plaintiffs are simply wrong. Section 17(a)(2), like Subsection (b) of Rule 10b-5, refers only to misstatements of fact, and to omission of those facts which are "necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." Thus Section 17(a)(2) is "specifically aimed at half-truths, as distinct from complete omissions." *Trussell* v. *United Underwriters, Ltd., supra,* 228 F. Supp. at page 762. Again, it is 17(a)(1) and 17(a)(3) which cover instances of complete concealment and non-disclosure by a seller or offerer of securities.

Plaintiffs' interpretation of the "language and purpose" in Section 17(a) is, further, contradicted by the legislative history of the 1933 Act. The Securities Act was intended to protect investors against false and deceptive practices, by requiring full disclosure of material information. *See, e.g., Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 195, 198; III Loss, Securities Regulation, page 1542. Thus, the Senate Report on the Act began with the following statement (Senate Report No. 47, 73d Cong., 1st Sess., Committee on Banking and Currency, April 17, 1933 at 1, 2):

> "The purpose of this bill is to protect the investing public and honest business. The basic policy is that of informing the investor of the facts concerning securities to be offered for sale in interstate and foreign commerce and providing protection against fraud and misrepresentation."

* * *

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* As this Court pointed out in *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 200, "the standard of liability created by a particular section of the [1933 and 1934] Acts must therefore rest primarily on the language of that section."

> "The necessity for the bill arises out of the fact that billions of dollars have been invested in practically worthless securities, both foreign and domestic, including those of foreign governments, by the American public through incomplete, careless, or false representations."

3. Plaintiffs further seek to eliminate manipulation and deception as necessary elements of the statute by arguing (Resp. Br. p. 11) that the "legislative history" of Section 10(b) shows that it was intended to be a "catch-all." Undoubtedly, Section 10(b) was intended as a catch-all for all forms of manipulation and deception; but in that function, the statutory elements of manipulation or deception must still be present, and nothing in the legislative history dispenses with this requirement. However, it is doubtful whether any reference to legislative history is necessary or appropriate in view of the clarity of the statutory language. "Not wishing 'to give point to the quip that only when legislative history is doubtful do you go to the statute,' we begin by looking to the text itself." *United States* v. *Bass,* 404 U.S. 336, 339 (1971) [footnote omitted]. Since Section 10(b) "speaks so specifically in terms of manipulation and deception," *Ernst & Ernst* v. *Hochfelder, supra,* 425 U.S. at page 214, its terms cannot be circumvented as plaintiffs seek to do here.

In fact, such "legislative history" as exists on this point actually negates plaintiffs' interpretation. The Senate Report on the 1934 Act specifically tied the express liability sections of the Act to manipulation and deception:

> "[T]he bill provides that any person who unlawfully manipulates the price of a security, or who induces transactions in a security by means of false or misleading statements, or who makes a false or misleading statement in the report of a corporation, shall be liable in damages to those who have bought or sold the security at prices affected by such violation or statement."

S. Rep. No. 792, 73d Cong. 2d Sess., 1934, pages 12-13. As the Court stated in *Hochfelder, supra,* "the catchall provision of § 10(b) should be interpreted no more broadly" than the sections which expressly impose liability (425 U.S. at page 206). And as the Court noted in *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723, 736:

> "It would indeed be anomalous to impute to Congress an intention to expand the plaintiff class for a judicially implied cause of action beyond the bounds it delineated for comparable express causes of action."

Plaintiffs' device of stretching Section 10(b), beyond the language of the statute and beyond the express liability provisions of the 1934 Act, is equally "anomalous," finds no support in the legislative history, and should be rejected.

4. Plaintiffs are equally inaccurate in arguing that the prior case law, under Section 10(b) and Rule 10b-5, supports the result below. Thus plaintiffs repeatedly cite (Resp. Br. pp. 8, 9, 16, 31-34) *Superintendent of Insurance* v. *Bankers Life & Cas. Co.,* 404 U.S. 6, for the proposition that Rule 10b-5 reaches any "breach of fiduciary duty," and that deception is unnecessary. In fact, however, the Court expressly "read § 10(b) to mean that Congress meant to bar deceptive devices and contrivances in the purchase or sale of securiites" (404 U.S. at page 12), and stated (404 U.S. at pages 12-13): "The crux of the present case is that Manhattan suffered an injury as a result of deceptive practices touching its sale of securities as an investor." The Court held (404 U.S. at page 9):

> "There certainly was an 'act' or 'practice' within the meaning of Rule 10b-5 which operated as 'a fraud or deceit' on Manhattan, the seller of the Government bonds. To be sure, the full market price was paid for those bonds; but the seller was duped into believing that it, the seller, would receive the proceeds." [footnote omitted]

Deceptive bookkeeping entries were also used in *Bankers Life,* so that Manhattan's books "reflected only the sale of its Government bonds and the purchase of the certificate of deposit and did not show that its assets had been used by Begole to pay for his purchase of Manhattan's shares or that the certificate of deposit had been assigned to New England and then pledged to Belgian-American Banking" (404 U.S. at pages 8-9). The lower court cases cited in plaintiffs' footnote (Resp. Br. pp. 22-23) are equally inapposite.*

5. Throughout their brief, plaintiffs ignore the specific language of Section 10(b), preferring instead to discuss generalized definitions of "fraud" from such sources as treatises on equity jurisprudence (Resp. Br. pp. 19-20), cases under the bankruptcy laws (*Pepper* v. *Litton,* 308 U.S. 295, cited Resp. Br. pp. 9, 32), and a curious collection

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* Thus, *e.g., Schlick* v. *Penn-Dixie Cement Corp.,* 507 F.2d 374 (2d Cir. 1974), *cert. denied,* 421 U.S. 976, involved allegations of deceptive accounting practices, to reduce the apparent income of one company and increase that of another, as well as deliberate market manipulations (see pages 10-11, *infra*). *Pappas* v. *Moss,* 393 F.2d 865 (3d Cir. 1968) (cited Resp. Br. p. 22 n.), was a derivative suit against directors who had purchased stock of their corporation on favorable terms; shareholder ratification of the purchase had been obtained through materials which contained "at least two material misrepresentations of fact" (393 F.2d at page 869). *Shell* v. *Hensley,* 430 F.2d 819 (5th Cir. 1970) (cited Resp. Br. p. 23) was a derivative suit against officers who had conspired to devote corporate funds to their personal use; among the specific deceptions alleged were non-disclosures as to the value of securities and land sold to the corporation, and a bogus employment contract intended to conceal improper payments to one of the defendants (430 F.2d at page 825). The holding in *Rekant* v. *Desser,* 425 F.2d 872 (5th Cir. 1970) was expressly based on findings that the defendants had made "affirmative misrepresentations" in reports to shareholders, and had "violated the directors' duty to disclose fully the material facts. . . ." (425 F.2d at page 882).

of common law fraud decisions.* As in the court below, plaintiffs also rely heavily on dictum from *S.E.C.* v. *Capital Gains Research Bureau, Inc.,* 375 U.S. 180 (Resp. Br. pp. 16-18), ignoring the fact that *Capital Gains* arose under the Investment Advisers Act of 1940, and in any event did involve deception through non-disclosure (see Petitioners' principal brief pages 14-15).

The essential fallacy of plaintiffs' position is the assumption that every alleged wrong must have a federal, as well as a state, remedy; plaintiffs' argument really is that any complaint which could state a cause of action at common law, for constructive "fraud," fiduciary breach, or "overreaching" must also state a claim under the specific provisions of Section 10(b). As the court noted in *Marsh* v. *Armada Corp.,* 533 F.2d 978, 979 (6th Cir. 1976), petition for certiorari filed No. 76-5:

> "This action is one of an increasing number of lawsuits in which minority shareholders, dissatisfied with the merger terms under which their stock is to be converted into cash or stock of the controlling corporation, seek a federal remedy by alleging violations of Section 10(b) of the Securities Act of 1934 (hereinafter Exchange Act) and Rule 10b-5 promulgated thereunder.
>
> "A common feature in this type of lawsuit is what is in reality a state law claim for unfairness or breach of fiduciary duty on the part of corporate officers and directors."
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> * * *

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* *E.g., Grin* v. *Shine,* 187 U.S. 181 (1902) (cited Resp. Br. p. 19) involved a habeas corpus proceeding, brought by a person facing extradition to Czarist Russia for embezzling 25,000 rubles. *Graffam* v. *Burgess,* 117 U.S. 180 (1886), (cited Resp. Br. p. 20), involved a real estate foreclosure. *Moore* v. *Crawford,* 130 U.S. 122 (1889) (cited Resp. Br. p. 17) was an action to compel the execution of a deed.

> "Thus in dealing with the issues raised here we are not faced with the question whether the defendants' alleged wrongs call for a remedy, but only whether plaintiffs should have access to the federal courts as well as the state courts to seek the remedy."

Under our federal system, however, the redress of many categories of grievances is still entrusted to the law of the states, in the absence of a clear federal preemption. *Lehman Brothers* v. *Schein,* 416 U.S. 386, 389. As discussed below, and at pages 19-27 of our principal brief, no such congressional preemption is involved here.

6. Plaintiffs also argue (Resp. Br. pp. 5, 8) that the short form merger herein violated Rule 10b-5 because it lacked a valid "corporate purpose." However, the entire issue of "corporate purpose," which was raised *sua sponte* by the panel below,* is irrelevant under the statute which plaintiffs purport to invoke: the presence or absence of a corporate purpose has no bearing whatever on the issue of deception or manipulation.

The issue of "corporate purpose" is equally irrelevant to the actual grievance of plaintiffs in this case. Assuming that the present merger had been required by the clearest possible "corporate purpose," plaintiffs would still have had precisely the same grievance they have now: a dis-

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* As noted in defendants' principal brief (page 16), plaintiffs had abandoned the corporate purpose argument in the Court of Appeals. Accordingly, the issue was not briefed or argued by either side. The majority of the panel below, however, revived the issue on its own motion, and proceeded on the assumption, contrary to the record (A 19a-20a), that Kirby's funds had been used in the short form merger (533 F.2d at pages 1285, 1280, 1290). Proceeding from this erroneous premise, the panel took over almost verbatim the holding in *Marshel* v. *AFW Fabric Corp.,* 533 F.2d 1277, 1282 (2d Cir. 1976), *rehearing denied,* 533 F.2d 1309 (2d Cir. 1976), *vacated and remanded,* 97 S. Ct. 228, where corporate funds had in fact been used to buy the minority shares.

satisfaction with the price tendered for their stock. That, and that alone, is the substance of plaintiffs' claim (533 F.2d at page 1288). The present action is before this Court, not because of the presence or absence of a "corporate purpose," but simply because plaintiffs preferred to bring an appraisal action in the federal, rather than the state court.

Further, neither plaintiffs nor the panel below have ever articulated any standards by which the validity of a "corporate purpose" could be ascertained. In thus rewriting the Delaware statute, which exists for the sole purpose of facilitating short form mergers, the majority implicitly held that none of the corporate advantages which Judge Moore listed as inherent in such a merger (533 F.2d at page 1308) would suffice to meet this test. However, the majority made no intelligible statement as to what more is required, or how the sufficiency of a corporate purpose can be measured. As Judge Moore stated (533 F.2d at page 1309):

> "I cannot believe that the majority has chosen to exceed the bounds of its jurisdiction under federal law in order to espouse so frail a concept, and I am more convinced than ever of the wisdom which the Supreme Court showed in compelling the federal judiciary to refrain from the business of rewriting state law by judicial fiat."

7. Plaintiffs also attempt, in passing, to assert (Resp. Br. pp. 13-14) that the events in this action fall within the definition of "manipulation," and thus come within the scope of Section 10(b). This position is equally untenable. Manipulation in the securities context is "virtually a term of art," for conduct intended to mislead investors by creating a deceptive appearance of market activity, such as "wash" sales and "matched" orders. *See Ernst & Ernst* v. *Hochfelder, supra,* 425 U.S. at pages 199, 205; III Loss, Securities Regulation, p. 1529 *et seq.* The statutory intent

appears clearly from the House Report accompanying the 1934 Act, which stated that "the accentuation of temporary fluctuations and the deliberate introduction of a mob psychology into the speculative markets by the fanfare of organized manipulation menace the true functioning of the exchanges." H. R. Rep. No. 1383, 73d Cong., 2d Sess. (1934) 11.

The meaning of "manipulation" in the 1934 Act is further illustrated by Section 9 of the statute, "Prohibition Against Manipulation of Security Prices." All of the specific practices enumerated in Section 9—fictitious sales, matched orders, dissemination of misleading projections, stabilization, and others—are potential devices for creating a false appearance of market activity.* In terms, "non-disclosure of a manipulation is usually, if not invariably, essential to its success." III Loss, Securities Regulation, page 1565. No allegation of manipulation, within the meaning of the 1934 Act, is involved in this action.

8. Plaintiffs also argue in the alternative (Resp. Br. pp. 26-30) that there was "misrepresentation and non-disclosure," because the admittedly full disclosure in the information statement was sent the day after the short form merger, rather than before. In this connection plaintiffs rely upon the statement in Judge Mansfield's concurring opinion (533 F.2d at page 1297) that the disclosure was made "too late to enable the minority to invoke state law for protection against an unwarranted squeeze-out."

Despite Judge Mansfield's suggestion, there is no such thing under Delaware law as an "unwarranted squeeze-out" in a short form merger. This is so "because the very purpose of the statute is to provide the parent corporation with a means of eliminating the minority shareholder's interest in the enterprise. Thereafter the former stock-

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* The text of Section 9 is reprinted as an Appendix to this reply brief.

holder has only a monetary claim." *Stauffer* v. *Standard Brands Incorporated,* 187 A.2d 78, 80 (Del. Sup. Ct. 1962). No other "corporate purpose" is required for a short form merger. *Singer* v. *The Magnavox Company,* A.2d (Del. Ch. Oct. 26, 1976); *Bruce* v. *E. L. Bruce Company,* 174 A.2d 29, 30 (Del. Ch. 1961). The only aspect of a short form merger which could be "unwarranted," under Delaware law, would be an inadequate price, which any dissatisfied stockholder is free to reject, in favor of a judicial appraisal proceeding in the Delaware Court of Chancery. Thus, any application to the Delaware state courts for a preliminary injunction would necessarily be denied, on the ground that the minority stockholders had an adequate remedy at law. There would be no remedy under state law for the stockholders to "invoke" other than appraisal.

Thus, pre-merger notice, under the Delaware statute, would serve no useful function whatever. In arguing that the absence of prior notice violates Rule 10b-5, plaintiffs are in the unusual position of arguing that it was a deceptive device to follow the terms of the Delaware statute. This argument is untenable.

Under such circumstances, the relevant question under the federal securities laws is whether full and fair disclosure has been made, in time and in a manner for the minority stockholders to make an informed decision. As the Second Circuit earlier observed, in *Popkin* v. *Bishop,* 464 F.2d 714, 720 n. 16 (1972):

> "Where the right to appraisal and payment for shares is the exclusive shareholder remedy under state law, the federal disclosure provisions are still not 'nugatory.' They will help ensure that shareholders have the information necessary for an intelligent exercise of their appraisal rights."

9. Plaintiffs seek to dismiss the serious problem of federalism, raised by the decision below, with the truism (Resp. Br. p. 36) that "the commerce power of Congress over securities fraud is beyond serious question and is not an issue in this case." That observation is irrelevant here: nothing in Section 10(b) indicates a Congressional intent to treat short form mergers, which are valid under state statutes, as constituting "securities fraud." Even strong advocates ~~of federal~~ corporate legislation have expressed concern at the pressure, in recent Rule 10b-5 litigation, "to take new ground that is really beyond the ground of disclosure that the 1933-34 system was designed to allocate to the Federal Government."* This, however, is precisely what the court below has done, without any statutory support.

Nor is the problem avoided by asserting (Resp. Br. p. 35) that Delaware law will still be permitted to operate as to "non-fraudulent" short form mergers. To be "non-fraudulent" under the decision below, a merger must meet a requirement of independent "corporate purpose," when the Delaware courts have emphatically repudiated any such requirement. *See, e.g., Stauffer* v. *Standard Brands Incorporated, supra,* 187 A.2d at page 80; *Bruce* v. *E. L. Bruce Company, supra,* 174 A.2d at page 30; *Singer* v. *The Magnavox Company,* A.2d (Del. Ch. Oct. 26, 1976). It is equally specious to dismiss the conflict with state law by asserting (Resp. Br. p. 32) that a fraud may be committed while following the forms of a statute: in this case the *raison d'être* of the state statute is to permit the very act which is here attacked as "fraud." As was recognized by the concurring opinion below, "state law has authorized the [short form merger] device to be used for the purpose of squeezing out the public shareholders

* Testimony of Professor Detlev Vagts, Senate Serial No. 94-95, Committee on Commerce, 94th Cong., 2d Sess., 1976, p. 333.

without giving them prior notice or an opportunity to obtain injunctive relief. . . ." (533 F.2d at page 1296, quoted by plaintiffs at Resp. Br. p. 22).*

Plaintiffs are in effect urging that wide areas of state corporation law should be displaced or rewritten by federal judicial action. The desirability of such federal preemption should, however, be decided by the Congress and not by the courts. A federal corporation statute would at least avoid the wide-reaching uncertainty which the decision below would inject into areas now covered by state law: the vague and open-ended scope of the panel's decision in this case would inevitably cause a massive increase in the volume of litigation, the bulk of which, based on past experience, would be brought in the federal rather than the state courts. See Sherrard, *Fiduciaries and Fairness Under Rule 10b-5,* 29 Vanderbilt L.Rev. 1385, 1417-18 (1977). Further, the resulting confusion would undermine the certainty which has been a primary objective of state corporation law, and a primary attraction of the Delaware statute.**

Similar considerations have led even vigorous advocates of comprehensive federal standards to recognize that "it seems anomalous to jig-saw every kind of corporate dispute into the federal courts through the securities acts as

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* Equally insufficient are plaintiffs' repeated assertions that the merger involved "self-dealing" (Resp. Br. pp. 24, 25). Every merger of a parent and its subsidiary necessarily involves "self-dealing," and that alone is not sufficient to make it fraudulent. Delaware law is clear that "the merger is an act of independent legal significance and the mere fact that those who initiate it will receive some benefit does not make it fraudulent." *MacCrone* v. *American Capital Corporation,* 51 F. Supp. 462, 469 (D. Del. 1943) [footnote omitted].

** *See, e.g.,* testimony of former Commissioner A. A. Sommer, Jr. of the S.E.C., Senate Serial No. 94-95, Committee on Commerce, 94th Cong., 2d Sess., 1976, p. 58.

they are presently written." Cary, *Federalism and Corporate Law: Reflections upon Delaware,* 83 Yale L.J. 663, 700 (1974). We submit that the court below erred in seeking to "jig-saw" short form mergers, lawful under state statutes, into the disclosure provisions of Section 10(b) and Rule 10b-5.

Conclusion

For the reasons set forth above, and in petitioners' principal brief, the decision below, with respect to petitioners, should be reversed.

Respectfully submitted,

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Appendix—Statutes

SECTION 9 OF THE SECURITIES EXCHANGE ACT OF 1934

§ 78i. Manipulation of security prices

(a) It shall be unlawful for any person, directly or indirectly, by the use of the mails or any means or instrumentality of interstate commerce, or of any facility of any national securities exchange, or for any member of a national securities exchange—

(1) For the purpose of creating a false or misleading appearance of active trading in any security registered on a national securities exchange, or a false or misleading appearance with respect to the market for any such security, (A) to effect any transaction in such security which involves no change in the beneficial ownership thereof, or (B) to enter an order or orders for the purchase of such security with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the sale of any such security, has been or will be entered by or for the same or different parties, or (C) to enter any order or orders for the sale of any such security with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the purchase of such security, has been or will be entered by or for the same or different parties.

(2) To effect, alone or with one or more other persons, a series of transactions in any security registered on a national securities exchange creating actual or apparent active trading in such security or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others.

(3) If a dealer or broker, or other person selling or offering for sale or purchasing or offering to purchase the

security, to induce the purchase or sale of any security registered on a national securities exchange by the circulation or dissemination in the ordinary course of business of information to the effect that the price of any such security will or is likely to rise or fall because of market operations of any one or more persons conducted for the purpose of raising or depressing the prices of such security.

(4) If a dealer or broker, or other person selling or offering for sale or purchasing or offering to purchase the security, to make, regarding any security registered on a national securities exchange, for the purpose of inducing the purchase or sale of such security, any statement which was at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, and which he knew or had reasonable ground to believe was so false or misleading.

(5) For a consideration, received directly or indirectly from a dealer or broker, or other person selling or offering for sale or purchasing or offering to purchase the security, to induce the purchase or sale of any security registered on a national securities exchange by the circulation or dissemination of information to the effect that the price of any such security will or is likely to rise or fall because of the market operations of any one or more persons conducted for the purpose of raising or depressing the price of such security.

(6) To effect either alone or with one or more other persons any series of transactions for the purchase and/or sale of any security registered on a national securities exchange for the purpose of pegging, fixing, or stabilizing the price of such security in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) It shall be unlawful for any person to effect, by use of any facility of a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors—

(1) any transaction in connection with any security whereby any party to such transaction acquires any put, call, straddle, or other option or privilege of buying the security from or selling the security to another without being bound to do so; or

(2) any transaction in connection with any security with relation to which he has, directly or indirectly, any interest in any such put, call, straddle, option, or privilege; or

(3) any transaction in any security for the account of any person who he has reason to believe has, and who actually has, directly or indirectly, any interest in any such put, call, straddle, option, or privilege with relation to such security.

(c) It shall be unlawful for any member of a national securities exchange directly or indirectly to endorse or guarantee the performance of any put, call, straddle, option, or privilege in relation to any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(d) The terms "put", "call", "straddle", "option", or "privilege" as used in this section shall not include any registered warrant, right, or convertible security.

(e) Any person who willfully participates in any act or transaction in violation of subsections (a), (b), or (c) of this section, shall be liable to any person who shall purchase or sell any security at a price which was affected by

such act or transaction, and the person so injured may sue in law or in equity in any court of competent jurisdiction to recover the damages sustained as a result of any such act or transaction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant. Every person who becomes liable to make any payment under this subsection may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment. No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation.

(f) The provisions of this section shall not apply to an exempted security.